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No. __

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

AYUDA, INC., *et al.*,

Petitioners,

v.

RICHARD THORNBURGH, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

Whether the provisions of the Immigration and Nationality Act—which allow judicial review of determinations respecting legalization applications by the courts of appeals only in the context of deportation proceedings under 8 U.S.C. § 1105a—divest the district courts of general federal question jurisdiction under 28 U.S.C. § 1331, and jurisdiction of "all causes arising under the" immigration laws under 8 U.S.C. § 1329, to consider broad-based statutory and constitutional challenges to restrictive INS policies regarding legalization claims.

Whether an agency action is final and ripe for review, under this Court's decision in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), when that action consists of a regulation and agency policy statements, and when further refinements of the agency's regulation and policy cannot occur prior to the lapse of a statutory deadline.

PARTIES TO THE PROCEEDING

The parties in this Court are as follows:

Petitioners: Ayuda, Inc., the Ethiopian Community Center, Inc., Latin American Youth Center, Mexican American Legal Defense and Educational Fund, N.K. Doe, J.H. Doe, T.B. Doe, K.A.A. Doe and J.N.U. Doe.[1]

Respondents: Richard Thornburgh, individually, and as Attorney General of the United States, Gene McNary, individually, and as the Commissioner of the Immigration and Naturalization Service, and the Immigration and Naturalization Service.

In the court from whose judgment review is sought, Petitioners were Appellees and Respondents were Appellants. In the trial court, Petitioners were Plaintiffs and Respondents were Defendants.

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[1] This lawsuit was brought originally, in part, as a class action. The individually named "Doe" plaintiffs brought the action on behalf of themselves and others similarly situated asserting that they were entitled to legalization pursuant to 8 U.S.C. § 1255(a), but that they would be denied such legalization because of the restrictive regulations interpreting the term "known to the Government" set forth in 8 C.F.R. § 245a.1(d). *See* original Complaint for Injunctive and Declaratory Relief, March 8, 1988.

The United States District Court for the District of Columbia found that the organizational plaintiffs had standing to challenge the INS regulation, and therefore it found it did not need to decide the standing of the individual plaintiffs, nor did it need to certify the class. On September 2, 1988, plaintiffs before the district court sought to amend the Complaint for Injunctive and Declaratory Relief to add as individual plaintiffs certain aliens who had been or would be denied legalization benefits because their claims were based upon section 265 violations. At this time, plaintiffs before the district court also moved for class certification. Both motions remain pending before the district court.

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v.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Ayuda, Inc., et al., respectfully pray that a Writ of *Certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in this case on July 18, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit in *Ayuda, Inc. v. Thornburgh* is reported at 880 F.2d 1325 (D.C. Cir. 1989), and is reprinted in the Appendix to this Petition ("App.") p. 1a. The denial by the United States Court of Appeals for the District of Columbia Circuit of the Petitioners' Petition for Rehearing and Suggestion for Rehearing *En Banc* is reprinted in the Appendix, App. p. 197a. The opinion of the United States Court of Appeals for the District of Colum-

bia Circuit denying Respondents' Petition for a Writ of Mandamus in *In Re Thornburgh* is reported at 869 F.2d 1503 (D.C. Cir. 1989), App. p. 166a. The opinion of the United States District Court for the District of Columbia is reported at 687 F.Supp. 650 (D.D.C. 1988), App. p. 88a.

JURISDICTION

The judgment of the Court of Appeals was entered on July 18, 1989. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* in the Court of Appeals was denied on October 4, 1989.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1988).

STATUTES AND REGULATIONS INVOLVED

The relevant statutory provisions and regulations involved in this proceeding are printed in the Appendix. They are: Immigration and Nationality Act ("INA") Sections 106, App. p. 214a; 245A(a)(2), App. p. 219a; 245A(f), App. p. 220a; and 279, App. p. 222a, (8 U.S.C. §§ 1105a, 1255a(a)(2), 1255a(f), and 1329 (1988), respectively); 28 U.S.C. § 1331 (1988), App. p. 223a; former Section 265 of the INA, 8 U.S.C. § 1305 (1976), App. p. 224a; and 8 C.F.R. §§ 245a.1(d) and 245a.2(b)(3) (1987), App. p. 225a.

STATEMENT OF THE CASE

This Petition challenges the decision of the United States Court of Appeals for the District of Columbia Circuit vacating an order of the United States District Court for the District of Columbia. The district court's order enjoined the Immigration & Naturalization Service ("INS") from denying legalization to certain nonimmigrants who failed to meet the reporting requirements of former INA § 265, 8 U.S.C. § 1305, (hereinafter "§ 265") if the INS determined that such aliens credibly established a willful

violation of § 265 and otherwise met the applicable conditions for legalization.

The D.C. Circuit held that the district court was without jurisdiction to hear the challenge to INS's regulations and policies which had resulted in the order. Of the nine federal courts around the nation which have ruled on challenges to the INS's implementation of the legalization provisions of the Immigration Reform and Control Act of 1986 ("IRCA"), the D.C. Circuit was the only court to find that there was no federal question jurisdiction in the district courts. Moreover, the decision of the court of appeals throws into chaos over twenty years of jurisprudence, established by decisions from this Court and other federal courts, firmly upholding district court federal question jurisdiction under 28 U.S.C. § 1331, and 8 U.S.C. § 1329 of causes arising under the U.S. immigration laws, not within the context of a final order of deportation or exclusion. Finally, the holding of the court of appeals runs roughshod over what has become a black-letter principle of administrative law—the presumption in favor of judicial reviewability of agency actions.

The greatest irony of this case is that the focus of the Court of Appeals' decision was perhaps the most compassionate immigration statute ever enacted. Congress created the "legalization" provisions of IRCA in order to grant legal status to a large subclass of aliens living in the U.S. unlawfully. In order to maximize participation in the legalization program, Congress required the INS to "incorporate flexibility into the standards for legalization eligibility . . . taking into consideration the special circumstances relating to persons previously living clandestinely." H. Rep. No. 682, 99th Cong., 2d Sess. 93 (1986). Congress ordered the INS to implement legalization in a "liberal and generous fashion" so that "millions" of aliens living in the U.S. illegally since 1982 would "emerge from the shadows" to make legalization a success. 132 Cong. Rec. H. 9709 (Oct. 9, 1986) (Statement of Rep. Rodino).

Instead of implementing the legalization program in this generous spirit, the INS drew narrow eligibility guidelines which effectively crippled the ability of thousands of aliens to seek the benefits of the new law. It is one such narrow restriction of a legislatively-established guideline which is the subject of this case.

The *Ayuda* suit was instituted in the district court on March 8, 1988, by four immigration counseling organizations, including two Qualified Designated Entities ("QDEs"),[1] and, as a class action, by five aliens, individually, and on behalf of a class of others similarly situated. The case involved the "known to the Government" provision of 8 U.S.C. § 1255a(a)(2)(B). 8 U.S.C. § 1255a(a)(2)(B) provides that applicants who are "nonimmigrants" (*i.e.*, persons who entered the United States lawfully prior to 1982 for a temporary period) must have violated restrictions on their nonimmigrant status as of January 1, 1982, and must establish that their resultant "unlawful status was known to the Government as of [January 1, 1982]."

Despite the plain statutory language and Congress' generous motives, the INS issued regulations in May 1987 that narrowly defined "known to the Government" to require the alien's presence to have been "known to the INS" prior to January 1, 1982. 52 Fed. Reg. 16206 (1987); 8 C.F.R. § 245a.1(d) (1987). On September 22, 1987, the United States District Court for the Northern District of Texas, on a Motion for a Writ of Habeas Corpus, held that the INS's regulations regarding the term "known to

[1] A Qualified Designated Entity is a non-profit organization, such as Petitioners Ayuda, Inc. and the Ethiopian Community Center, that contracts, *inter alia*, to receive and screen legalization applications pursuant to the Immigration Reform and Control Act of 1986, and to provide assistance and information to aliens seeking legalization benefits. The designation of these organizations to assume such a role derives from a Congressional grant of special status in the Immigration Reform and Control Act of 1986. *See* 8 U.S.C. § 1255a(c). *Ayuda v. Meese*, 687 F.Supp. at 655-658 and n. 4.

the Government" were inconsistent with IRCA and outside the scope of the INS's authority. *Farzad v. Chandler*, 670 F. Supp. 690 (N.D. Tex. 1987). The INS ignored this district court's holding and continued to use the May 1987 regulation without modification. Plaintiffs therefore filed this action.[2]

On March 30, 1988, the District Court for the District of Columbia rejected the INS's definition of the phrase "known to the Government" as violative of the "crystal clear" statutory language, as well as the "broad remedial purpose" of the statute. *Ayuda v. Meese*, 687 F. Supp. at 661-63.[3] The district court declared the INS's regulation to be contrary to law. *Id.* at 666.[4]

On April 21, 1988, a Motion to Intervene as Plaintiffs, with a Proposed Complaint, was filed by an additional group of immigration counseling organizations ("Proposed Intervenors"). Proposed Intervenors asserted that aliens who had failed to file annual or quarterly registration reports with the INS, pursuant to INA § 265, were eligible for legalization under the district court's interpretation of "known to the Government," because their violation, which

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[2] The first count of the Complaint asserted that the INS regulation at 8 C.F.R. § 245a.1(d) violated the statutory terms of 8 U.S.C. § 1255a(a)(2)(B), and was arbitrary, capricious, and in excess of statutory authority under the A.P.A. The second count asserted a constitutional claim—that the regulation, and the INS's policies and practices pursuant to that regulation, violated the Fifth Amendment to the United States Constitution.

[3] Because the district court found the regulation to be inconsistent with IRCA and thus outside the scope of the INS's authority, the court necessarily did not reach the issue of whether the regulation and the practices and procedures of the INS violated the Constitution.

[4] The Defendants in the district court later chose not to appeal the district court's March 30, 1988, ruling, and the first three Supplemental Orders entered in the case. *See* "Defendant's Opposition to Plaintiffs' Motion for Entry of Supplemental Order VIII" filed May 17, 1988, at page 9.

constituted a deportable offense, made their unlawful status "known to the Government".[5] As the district court wished to minimize the number of parties, Plaintiffs incorporated as their own the arguments and evidence presented by the Proposed Intervenors.[6] The evidence[7] documented the great amount of confusion present among QDEs nationwide because of the INS's refusal to consider a § 265 violation "known to the Government".

On May 2, 1988—two days prior to the May 4, 1988, filing deadline for legalization applications—the district court entered Supplemental Order V which provided *inter alia*,

> that INS shall be enjoined from denying legalization to nonimmigrant aliens who contend that they violated their nonimmigrant status prior to January 1, 1982 by failing to comply with the

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[5] Prior to January 1, 1982, there were three distinct reporting requirements for nonimmigrants under § 265: an annual report every January on Form I-53, a report every 90 days on Form AR-11, and a report within ten days of every address change on Form AR-11. *See* 8 U.S.C. § 1305 (1976). Therefore, Proposed Intervenors contended, as of January 1, 1982, the INS was able to determine by the nonexistence of these reports which aliens were in an unlawful status for failure to comply with the address reporting requirements of § 265, because INS had records for all nonimmigrants showing their admission.

[6] *See* "Plaintiff's Motion to Admit Additional Co-Counsel" filed on April 28, 1988, at 1. The Motion was granted by the district court on the same day as it was filed. *See also* note 1 to "Plaintiffs' Memorandum in Reply to Defendants' Opposition to Intervenors' Motion to Compel Compliance and/or Modify Permanent Injunctions," filed on May 2, 1988.

[7] Along with the Motion to Admit Additional Co-Counsel, on April 28, 1988, Plaintiffs filed fifteen affidavits from individuals and QDEs, many of which discussed the § 265 theory of eligibility for legalization. *See* "Notice of Evidence of Defendants' Failure to Comply with the Court's Orders and Renewal of Request to Toll May 4, 1988 Filing Deadline." Further affidavits and declarations were filed the next day, on April 29, 1988.

> mandatory quarterly or annual registration requirements of [§ 265], if INS determines that such aliens have credibly established their willful violation of Section 265, and such aliens have also met all other applicable conditions for legalization. . . .

Ayuda v. Meese, 687 F.Supp. at 668.

On July 5, 1988, Respondents filed a Notice of Appeal, appealing from certain parts of Supplemental Order V, as well as parts of Supplemental Orders IV and VII. On December 1, 1988, Respondents filed a Motion for Partial Withdrawal of their pending appeal,[8] which Motion was granted by the court of appeals on December 16, 1988.[9]

Following argument on the appeal of Supplemental Order V, a panel of the D.C. Circuit, in a 2-1 decision, va-

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[8] Respondents sought to withdraw those portions of their appeal which dealt with Supplemental Orders IV and VII.

[9] On September 2, 1988, Plaintiffs filed in the district court a Motion for Leave to Amend Complaint to add new individual Plaintiffs as representatives of the class, to redefine Plaintiffs' class to include, *inter alia*, those persons who failed to file annual and quarterly reports pursuant to § 265 and for class certification. The district court decided to hold these motions in abeyance and both are still pending to this day.

In addition, on November 18, 1988, Respondents filed a Petition for Writ of Mandamus in the court of appeals covering Supplemental orders XI and XII, which established a Special Master procedure for certain aliens who failed to file legalization applications on or before May 4, 1988. These aliens include the non-registrant aliens who did not receive notice of the May 2 Supplemental Order V in time to file their legalization applications on or before the May 4, 1988 deadline. Following argument, a panel of the D.C. Circuit, in a unanimous opinion issued on March 3, 1989, refused to grant the writ of mandamus, holding that the case "in its present posture does not clearly fail to present a case or controversy, and the district court's continued exercise of jurisdiction does not violate the judicial review provisions of the IRCA." *In Re Thornburgh*, 869 F.2d 1503, 1517 (D.C. Cir. 1989).

cated the district court's order. Circuit Judge Silberman, writing for the majority ("the *Ayuda* majority"), found that the judicial review provisions of the legalization program precluded district court review. The majority also held that the INS's policy on the § 265 theory was not ripe for review, notwithstanding an INS regulation and other policy statements which precluded § 265 claims.[10] Chief Judge Wald filed a dissent in which she stated that neither the judicial review provisions of IRCA, nor the ripeness or standing doctrines precluded the district court's exercise of federal question jurisdiction under 28 U.S.C. § 1331 and 8 U.S.C. § 1329 to invalidate INS legalization rules. *Id.* at 1366.

On September 1, 1989, Petitioners filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* with the court of appeals. On October 4, the panel, by a 2-1 vote, denied the Petition for Rehearing. At the same time, the full court of appeals issued an Order stating that a majority of the judges of the court in regular active service had not voted in favor of the Suggestion for Rehearing *En Banc*.[11]

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[10] Though the court did not specifically address the Plaintiffs' additional claim that the INS practices and procedures violated the Fifth Amendment to the United States Constitution, it inferentially dismissed that claim by concluding that the district court lacked all jurisdiction to consider and issue Supplemental Order V.

[11] Four separate opinions were issued on this vote. Four of the nine active judges voted to rehear the case *en banc*. In addition, however, Circuit Judge Buckley stated that due to his own views on the issues in the case, he concurred in the denial of rehearing, because to do otherwise would "raise false hopes among the appellees while denying them the opportunity for prompt review by the Supreme Court."

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE DISTRICT OF COLUMBIA CIRCUIT IN AYUDA V. THORNBURGH ON THE JURISDICTION OF THE DISTRICT COURTS TO ENTERTAIN CHALLENGES TO INS RULES DIRECTLY CONFLICTS WITH A DECISION OF ANOTHER COURT OF APPEALS, CONTRAVENES A PREVIOUS DECISION OF THIS COURT, AND RUNS COUNTER TO ESTABLISHED AND PREVAILING PRINCIPLES OF LAW AS SET FORTH IN OTHER FEDERAL COURT DECISIONS AROUND THE COUNTRY.

A. A CLEAR CONFLICT EXISTS BETWEEN THE D.C. AND ELEVENTH CIRCUITS OVER THE QUESTION OF WHETHER THE DISTRICT COURTS HAVE JURISDICTION TO HEAR CHALLENGES TO INS REGULATIONS AND GUIDELINES UNDER IRCA

The *Ayuda* majority ruled that a district court challenge to an INS regulation was an action seeking "judicial review of a determination respecting an application for adjustment of status." Since, according to the majority, Congress intended judicial review of such applications to be solely in the courts of appeal following the issuance of an order of deportation in an individual case, the district courts were without jurisdiction to hear challenges to INS regulations, policies or procedures.

The statute which was the basis for the majority's ruling is 8 U.S.C. § 1255a(f). That statute applies, by its terms, only to "review of *a* determination respecting *an* application" for legalization (emphasis added). Under this provision, an individual whose application for legalization has been denied by the INS may obtain administrative review of this denial by appealing to a single level of appellate review created for legalization appeals. 8 U.S.C. § 1255a(f)(3)(A). That review is to be based "solely upon the administrative record established at the time of *the determination on the application*", 8 U.S.C. § 1255a(f)(3)(B) (emphasis added). IRCA's legalization provisions tie *judi-*

cial review of a decision on a legalization application to a statutory provision which has been in existence since 1961, 8 U.S.C. § 1105a(a), which allows for judicial review of final orders of deportation in the courts of appeal.

According to the *Ayuda* majority, an INS-promulgated regulation constitutes "*a* determination respecting *an application*" because such regulations "embod[y] determinations that will impact" future applications. 880 F.2d at 1331 (emphasis added). Thus, in the majority's view, 8 U.S.C. § 1255a(f) precludes district courts, even under their federal question jurisdiction, 28 U.S.C. § 1331(a), and their jurisdiction over all cases arising under the immigration laws, 8 U.S.C. § 1329, from entertaining a statutory or constitutional challenge to regulations. Because the majority finds that 8 U.S.C. § 1255a(f) precludes judicial review of agency action, and that such action is committed to agency discretion by law, the majority's analysis also divests district courts of jurisdiction over claims under the Administrative Procedure Act ("APA").[12]

This restrictive view of the jurisdiction of the district courts directly conflicts with the 11th Circuit's jurisdictional analysis in *Haitian Refugee Center v. Nelson*

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[12] Under the majority's jurisdictional analysis, the INS could publish a regulation, or institute a policy, interpreting IRCA to apply only to white (or male, or European) aliens and be immune from any judicial review unless or until an individual alien: (1) who had spent the time and money to apply for legalization benefits despite the regulations disqualifying him or her had received a denial of a legalization application; (2) either then voluntarily placed him or herself in deportation proceedings or later found him or herself arrested and taken into custody by the INS; (3) was in fact placed in deportation proceedings; (4) lost the deportation hearing; (5) appealed to the Board of Immigration Appeals; (6) lost the appeal before the Board; and then (7) appealed a final order of deportation to the court of appeals. Indeed, even if the alien progressed as far as the court of appeals, that court would only have before it the agency's construction of the law "as applied to the particular applicant." *See* 880 F.2d. at 1333 n.9.

("*HRC*"), 872 F.2d 1555 (11th Cir. 1989),[13] of the identical statutory language. In *HRC*, two organizations and seventeen individual applicants for amnesty under the "Special Agricultural Worker" ("SAW") legalization provisions of IRCA[14] challenged, in district court, the INS's practices and policies in administering the program.[15] The District Court for the Southern District of Florida found jurisdiction to consider the challenge, notwithstanding the judicial review provisions of 8 U.S.C. § 1160(e)(1).[16]

In affirming the decision of the district court, the 11th Circuit found that district court jurisdiction over regula-

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[13] Neither the *Ayuda* panel majority, nor any of the statements issued denying the petition for rehearing *en banc*, addressed the decision of the 11th Circuit, even though that Circuit's ruling was issued in May of 1989, approximately two months before the D.C. Circuit panel decision in *Ayuda*.

[14] *See* 8 U.S.C. §§ 1160(a)(1)(A) and (B). As with IRCA's legalization program, the SAW program offered "amnesty" to certain aliens.

[15] The challenges asserted, *inter alia*, imposition of an unlawful burden of proof, the denial of meritorious applications for SAW status, the issuance of denial notices which failed to specify reasons for denial, and imposition of an interview procedure violative of the Fifth Amendment right to Due Process.

[16] 8 U.S.C. § 1160(e)(1), provides that "[t]here shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this Section except in accordance with this subsection." The Attorney General is directed to "establish an appellate authority to provide for a single level of administrative review of such a determination," 8 U.S.C. § 1160(e)(2)(A), and [t]here shall be judicial review of such a denial only in the judicial review of an order of exclusion or deportation under section 1105a of this title." 8 U.S.C. §1160(e)(3)(A). That judicial review "shall be based solely upon the administrative record" and the "determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole." 8 U.S.C. § 1160(e)(3)(B). *These provisions are indistinguishable from the provisions of 8 U.S.C. § 1255a(f). See* the *Ayuda* majority's discussion of the provisions of Section 1255a(f) at 880 F.2d 1329.

tory challenges concerning a large group of aliens is fully consistent with the aim of Congress in passing 8 U.S.C. §1105a:

> In *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982), we concluded that because plaintiffs' complaint, which challenged the INS's accelerated procedures for processing asylum requests, addressed "matters alleged to be part of a pattern or practice by immigration officials to violate the constitutional rights of a class of aliens", plaintiffs' claims were independently cognizable in the district court under its federal question jurisdiction." *Id.* at 1033. In *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (in banc), *aff'd*, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985), we reaffirmed that Section 106 of the INA (codified at 8 U.S.C. § 1105a) does not deprive district courts of jurisdiction to review allegations of systematic abuses by INS officials. *Jean*, 727 F.2d at 980. We explained that to postpone "judicial resolution of a disputed issue that affects an entire class of aliens until an individual petitioner has an opportunity to litigate it on habeas corpus would foster the very delay and procedural redundancy that Congress sought to eliminate in passing § 1105a. *Id.* In this action, appellees do not challenge the merits of any individual determination, rather, like the plaintiffs in *Haitian Refugee Center v. Smith*, and *Jean v. Nelson*, they contend that defendants' policies and practices in processing SAW applications deprive them of their statutory and constitutional rights.

872 F.2d at 1560 [footnotes omitted].

The holding of the 11th Circuit in *HRC v. Nelson* is diametrically opposed to that of the D.C. Circuit in *Ayuda*. The 11th Circuit in *HRC* found that a challenge to INS

procedures and practices does not constitute "a review of a determination respecting an application for adjustment of status" under 8 U.S.C. § 1160(e)(1). 872 F.2d at 1560. The D.C. Circuit in *Ayuda* found that such a challenge does constitute "a review of a determination respecting an application for adjustment of status" under 8 U.S.C. § 1255a(f)(1). 880 F.2d at 1331. The 11th Circuit in *HRC* found that 8 U.S.C. § 1105a(a) did not bar federal question lawsuits by organizations and individuals alleging deprivation of statutory and constitutional rights under INS practices and policies. 872 F.2d at 1560. The D.C. Circuit in *Ayuda* found that it did. 880 F.2d at 1335. The conflict between the circuits thus could not be clearer, and petitioners urge that this Court grant their Petition for a Writ of *Certiorari* in order to resolve it.

B. THE D.C. CIRCUIT'S DECISION IN AYUDA CONFLICTS WITH THE HOLDING AND RESULT OF A DECISION OF THIS COURT

In *Jean v. Nelson*, 472 U.S. 846 (1984), this Court affirmed an *en banc* ruling of the 11th Circuit, and sent back to the district court for decision a challenge to an INS policy of detaining certain aliens pending disposition of asylum claims. The plaintiffs in *Jean* consisted of named representatives of a class of undocumented aliens from Haiti who allegedly had been denied parole. The *Jean* plaintiffs claimed that a new immigration policy was unlawful because it did not comply with the notice-and-comment rulemaking procedures of the APA, and that the policy was being enforced against the Haitians in violation of the Fifth Amendment. 472 U.S. at 849.

The district court in *Jean* was faced with a jurisdiction statute similar to that in *Ayuda* and *HRC*. In *Jean*, the statutory provision was 8 U.S.C. § 1105a(b).[17] Like its al-

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[17] 8 U.S.C. § 1105a(b), provides:

(b) Notwithstanding the provisions of any other law, an alien

legations in *Ayuda* and *HRC*—that court of appeals' review of final orders of deportation under § 1105a(a) precluded district court federal question jurisdiction—the INS asserted in *Jean* that § 1105a(b) provided for review of final exclusion orders only in habeas corpus proceedings and therefore the district court did not have federal question jurisdiction over challenges to INS rules. *Louis v. Meissner*, 532 F. Supp. 881, 885 (S.D. Fla. 1982).

The *Jean* district court agreed with the INS, concluding that Section 1105a(b) was indeed a bar, and found that it was without subject matter jurisdiction to hear all claims which might "merge" into a final order of exclusion. *Id.* at 885-889. The 11th Circuit reversed. Both the panel and *en banc* circuit court opinions extensively reviewed the jurisdictional bases for the suit and both held that Section 1105a(b) *did not prohibit* class action lawsuits challenging INS regulations or procedures. *See Jean v. Nelson*, 711 F.2d 1455, 1502-05 (11th Cir. 1983) and *Jean v. Nelson*, 727 F.2d 957, 979-981 (11th Cir. 1984) (*en banc*). As the *en banc* court stated:

> In this case, plaintiffs' claim could be heard by the district court pursuant to its jurisdiction under 28 U.S.C. § 1331, since petitioners are seeking a determination [under] the Refugee Act of 1980 and its accompanying regulations .... Because plaintiffs' complaint raises the issue whether the agency has acted in accord with the statutory mandate of Congress, as well as its own regulations and procedures, the district court can sustain jurisdiction over this claim ....

Jean v. Nelson, 727 F.2d at 980 n.32. Accordingly, the court remanded the case to the district court.

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against whom a final order of exclusion has been made heretofore or hereafter ... may obtain judicial review of such order by habeas corpus proceedings and not otherwise.

This Court affirmed and, in an opinion written by the Chief Justice, agreed that the case should be remanded "to the District Court for consideration of petitioner's claims based on the statute and regulations." *Jean v. Nelson*, 472 U.S. at 857. While this Court's opinion did not specifically address the question of the jurisdictional limitations of 8 U.S.C. § 1105a, by its ultimate conclusion, the Court clearly agreed with the 11th Circuit that the district court did have jurisdiction under 28 U.S.C. § 1331 and 8 U.S.C. § 1329 to consider challenges to INS regulations and procedures not brought within the context of deportation or exclusion proceedings.

The *Ayuda* majority states that this Court "express[ed] no view on jurisdictional issues" in *Jean v. Nelson*. *Ayuda v. Thornburgh*, 880 F.2d at 1335, 1336. However, these statements ignore the fact that this Court *affirmed* the 11th Circuit's *remand* of the case *to the district court*, and did so against a background of *three* lower court decisions which extensively discussed the limitations of 8 U.S.C. § 1105a(b). The D.C. Circuit's decision therefore conflicts with the holding and result of this Court's ruling in *Jean*, and Petitioners accordingly urge the Court to grant their Petition for a Writ of *Certiorari*.

C. THE D.C. CIRCUIT'S DECISION IN AYUDA CONFLICTS WITH ESTABLISHED AND PREVAILING PRINCIPLES OF IMMIGRATION JURISDICTIONAL LAW AS SET FORTH IN OTHER FEDERAL COURT DECISIONS AROUND THE COUNTRY

Every federal court to review the specific jurisdictional issue involved in this case, with the exception of the D.C. Circuit, has confirmed that district courts do indeed have jurisdiction to review challenges to the INS's implementation of the legalization provisions of IRCA under 28 U.S.C. § 1331 and 8 U.S.C. §1329. In addition to *Haitian Refugee Center, Inc. v. Nelson*, *supra*, previously discussed, these cases include *Vargas v. Nelson*, 682 F. Supp. 591, 597-98 (D.D.C. 1987); *Doe v. Nelson*, 703 F. Supp. 713,

720-22 (N.D. Ill. 1988); *Immigration Assistance Project v. INS*, 709 F. Supp. 998 (W.D. Wash. 1989), *appeal pending*; *Zambrano v. INS*, CV No. S-88-455 EJD (E.D. Cal. 1988); *appeal pending*; *Catholic Social Services v. Thornburgh*, No. CV-86-1343-LKK (E.D. Cal. 1988), *appeal pending* No. 88-15046; *League of United Latin American Citizens v. INS*, No. CV 87-04757 WDK (C.D. Cal. 1988), *appeal pending* No. 88-15046; as well as the district court ruling in *Ayuda*. In each of these cases, the court rejected the INS's argument that IRCA requires exclusive review of INS rules in the court of appeals following orders of deportation.

The *Ayuda* majority likewise stands alone among the federal courts because its restrictive reading of 8 U.S.C. § 1105a brings into question a long line of federal court cases which firmly establish federal question jurisdiction of district courts over challenges to INS policy and rule-making. *See Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1032-33 (5th Cir. 1982) and its progeny, *Jean v. Nelson*, *supra*, *Salehi v. District Director*, 796 F.2d 1286, 1290 (10th Cir. 1986); *Orantes-Hernandez v. Meese*, 685 F.Supp. 1488, 1503 (C.D. Cal. 1988); *Orantes-Hernandez v. Smith*, 541 F.Supp. 351, 364 (C.D. Cal. 1982).[18]

Rather than confronting and distinguishing the legal analysis in these cases, however, the majority dismisses them in a wholesale fashion, characterizing them as "a gaping hole in the INS's defensive line." *Id.* at 1336. By this, the majority implies that the INS is immune from all judicial review of its regulatory actions, policies and practices. As the cases above demonstrate, this result is contrary to the firmly established principle of immigration law that district courts *do* have jurisdiction under 28 U.S.C.

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[18] *See also Abdelhamid v. Ilchert*, 774 F.2d 1447, 1450 (9th Cir. 1985); *NCIR, Inc. v. INS*, 743 F.2d 1365, 1368-69 (9th Cir. 1984), *vacated on other grounds*, 107 S.Ct. 1881 (1987), *on remand*, No. CV-83-7297 (C.D. Cal. 1987).

§1331 and 8 U.S.C. §1329 to review challenges to INS policies and procedures.

Moreover, the majority's implication that *HRC v. Smith* was the first of these "gaping hole[s] in the INS's defensive line" is mistaken. There are, in fact, over twenty years of judicial authority supporting the jurisdiction of the district courts to consider challenges to general INS rulemaking and policies, as well as appeals of certain administrative orders and discretionary decisions not made within the context of final orders of deportation.

Certainly a major "gaping hole" was this Court's decision in *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968). In *Kwok*, this Court reviewed 8 U.S.C. § 1105a and held that this statutory provision "vest[s] in the courts of appeal exclusive jurisdiction to review final orders issued by specified federal agencies. In situations to which the provisions of [the] section . . . are inapplicable, the alien's remedies would, of course, ordinarily lie first in an action brought in an appropriate district court." 392 U.S. at 209-210.[19] *See Jaa v. U.S.*, 779 F.2d 569, 571 (9th Cir. 1986); *Narenji v. Civiletti*, 481 F. Supp. 1132 (D.D.C.) *rev'd on other grounds*, 617 F.2d 745 (D.C. Cir. 1979), *cert. den.* 446 U.S.

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[19] The *Ayuda* majority attempts to overcome the reasoning of *Kwok* by citing to the two more recent cases of *Foti v. INS*, 375 U.S. 217 (1963) and *INS v. Chadha*, 462 U.S. 919 (1983). The aliens in both *Foti* and *Chadha*, however, were seeking court of appeals review after being subject to outstanding final orders of deportation. *Foti*, 375 U.S. at 219n.1, *Chadha*, 462 U.S. at 928. Thus both *Foti* and *Chadha* involved judicial review of a specific "final order[] of deportation" under 8 U.S.C. § 1105a(a). This Court held that an alien *who is subject to a final order of deportation* can challenge all matters on which the validity *of that final order* is contingent in his or her appeal of the order under 1105a—the other matters being 'included" or "encompassed" with the term of the "final order[]." However, this is quite different from saying, as the *Ayuda* majority does, that under no circumstances can the legality or the constitutionality of INS regulations or policies be directly challenged outside the § 1105a procedure where no final order of deportation exists.

957 (1980); *Andres v. INS*, 460 F.2d. 287 (6th Cir. 1972); *Butterfield v. INS*, 409 F.2d. 170, 173-74 (D.C. Cir. 1969). *See also Tai Mui v. Esperdy*, 371 F.2d 772 (2nd Cir. 1966), *cert. denied* 386 U.S. 1017 (1967).

Because the *Ayuda* majority's decision is at odds with this entire body of jurisprudence, it undermines established and prevailing principles of immigration jurisdictional law. Petitioners therefore urge that this Court settle the conflict among the federal courts over this important question of federal law.

II. THE D.C. CIRCUIT'S READING OF 8 U.S.C. §§ 1255a(f) AND 1105a COMPLETELY UNDERMINES THE PRESUMPTION OF JUDICIAL REVIEWABILITY BY DISTORTING THE PLAIN MEANING OF THE STATUTORY LANGUAGE AND THE LEGISLATIVE HISTORY OF IRCA

It is fundamental that, in the absence of a clear indication that Congress intends to restrict judicial reviewability of agency action, such reviewability is to be presumed and that this may be overcome "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 141 (1967). Such evidence must be " 'specific language or specific legislative history that is a reliable indicator of congressional intent,' or a specific congressional intent to preclude judicial review that is 'fairly discernible in the detail of the legislative scheme.' " *Bowen v. Michigan Academy of Physicians*, 476 U.S. 667, 673 (1986). *Accord Traynor v. Turnage*, 108 S. Ct. 1372, 1378 (1988). *See also Block v. Community Nutrition Institute*, 467 U.S. 340, 351 (1984); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); *Rusk v. Cort*, 369 U.S. 367 (1962). Yet the *Ayuda* majority turns the presumption of judicial reviewability on its head, by commencing with a presumption *against* the reviewability of INS actions concerning IRCA and distorting statutory language and legislative history to support its premise.

Even before embarking upon its statutory construction analysis, the *Ayuda* majority decides what Congress "must have meant", reasoning that Congress could not have intended "to channel to the courts of appeals only the application of the statute in presumably less important individual cases while reserving to initial district court review (albeit subject to subsequent appeal) the much more important cases involving broad questions of statutory construction that would apply to a whole class of aliens." 880 F.2d at 1331. The majority then strains the statutory language to fit this imputed intent.

In order to make the statutory language encompass INS rulemaking as well as determinations on individual applications, the *Ayuda* majority centers its reading of 8 U.S.C. § 1255a(f)(1) upon the word "respecting," interpreting it to mean anything having any relation to, or impact upon legalization applications, or indeed, the legalization program as a whole. 880 F.2d at 1331. In so doing, the court effectively reads the words "an application" out of existence.

Yet, "[the] ordinary and obvious meaning of [a] phrase is not to be lightly discounted." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1986). The word "application" clearly refers to a written document or form with which an alien applies for legalization. As Chief Judge Wald points out in her dissent, "other provisions of IRCA inform us that an 'application[ ] for adjustment of status' is a concrete piece of paper that 'may be filed' with various entities, 8 U.S.C. § 1255a(c)(1), may be 'forward[ed]' by those entities to the Attorney General, *id.* § 1255a(c)(3), and must 'contain' certain information. *Id.* § 1255a(a)(1)(C)." 880 F.2d. at 1349. The majority's interpretation of the word "respecting," however, necessitates a far broader interpretation of the words "an application" than the ordinary language permits. Indeed, the majority contends that "an application" encompasses future applications or consolidated applications. 880 F.2d at 1331. This inference is

simply not fairly derived from the plain meaning of the words.[20]

Moreover, the majority's assertion that the term "determination *respecting* an application" is all-encompassing ignores the use of the word "denial" *in that same subsection of the Act* providing for judicial review under 8 U.S.C. § 1105a:

> There shall be judicial review of *such a denial* only in the judicial review of an order of deportation under Section 1105a of this title.

8 U.S.C. § 1255a(f)(4) (emphasis added). The subsequent reference to "a denial" makes clear that what is meant is a final determination of an individual application, *not* the "determination" of the Attorney General as to the content of INS regulations or policy.[21]

The *Ayuda* majority's jurisdictional scheme essentially substitutes 8 U.S.C. § 1255a(f) and 8 U.S.C. § 1105a for

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[20] As the dissent notes, the entire subsection dealing with administrative and judicial review makes clear that Congress used the phrase "a determination respecting an application" as a phrase encompassing any and all aspects of an *individual's* petition, not any and all aspects of the IRCA regulatory process. *See* 880 F.2d at 1350 and n.2 (Wald, C.J., dissenting).

[21] The majority analogizes its interpretation of the term "determination respecting an application" to this Court's construction of the term "any claim arising under" the Medicare Act in *Heckler v. Ringer*, 466 U.S. 602, 104 (1984). *See* 880 F.2d at 1336. In *Heckler*, this Court defined the word "claim" under the Medicare Act to include a challenge to agency policy that would prevent the plaintiff from getting an operation upon which a claim would be based. The distinction between *Heckler* and *Ayuda* is obvious. Congress did not use the language "claim arising under the provisions of this Act" when crafting IRCA's judicial review provisions. Indeed, this broad terminology is linguistically much closer to the term "all causes . . . arising under any of the provisions of this subchapter", contained in the INA's grant of jurisdiction to the district courts, 8 U.S.C. § 1329, than it is to the phrase "determination respecting an application."

the general jurisdictional grant of 8 U.S.C. § 1329. In addition, for cases arising under IRCA, it renders meaningless the grant of federal question jurisdiction in 28 U.S.C. § 1331. Congress could not have intended such an absurd result. As this Court stated in *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982), "[s]tatutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible."

Furthermore, the *Ayuda* majority is unable to find in IRCA any clear expression of Congressional intent to preclude federal question jurisdiction of INS rulemaking.[22] Instead the court relies upon the Senate version of the legalization judicial review provisions—never actually passed—and speculation about the Senate's motivation for acceding to the House bill. Thus the majority, though professing not to do so (*see* 880 F.2d at 1334-35), invents a new canon of statutory construction—that allegedly ambiguous statutes should be interpreted in favor of the House of Congress that *acquiesces* in the eventual text.

The Senate version of the judicial review provisions would have precluded judicial review of any "decision or determination under this section." S.1200, 99th Cong., 1st Sess. § 202(f)(1) (1985). Arguably, this Senate version might have precluded review of rulemaking as well as adjudication. *See* S. Rep. No. 132, 99th Cong., 1st Sess. 48 (1985). Recognizing that the House version which eventually became law was less restrictive than the Senate version, the *Ayuda* majority nevertheless states: "[W]e think it unlikely that the Senate would have agreed to the

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[22] The one "expression" that the Court does discuss is a statement made by Senator Cranston during a 1983 floor debate over an immigration reform bill that ultimately was fatally stalled in conference in the 98th Congress. *See* 880 F.2d at 1334-35. The judicial review provision which Senator Cranston discussed at the time was never enacted, and its language differed significantly from that which was ultimately passed. *See* 880 F.2d at 1353 n.7 (Wald, C.J., dissenting).

House language with the understanding that it permitted not only review of legalization determinations in the courts of appeals after deportation orders but also even more expansive, intrusive and direct review of policy determinations that would or could lead to denials of applications for adjustment." *Ayuda v. Thornburgh*, 880 F.2d at 1334-1335.

Certainly, the *Ayuda* majority's musings about the type of review the Senate *thought* it was accepting in agreeing to the House version are something far less than the "clearly expressed legislative intention" to preclude review. Moreover, the majority's theory that the House and Senate versions were in effect the same fails to explain why the House did not acquiesce in the Senate's more restrictive language.

The legislative history patently shows that Congress rejected a restrictive Senate judicial review provision which would have arguably cut off review of INS rulemaking in favor of a more generously worded House provision. Congress's final choice of language clearly demonstrates that it intended to preserve federal question jurisdiction over INS rulemaking with respect to legalization.

Finally, the *Ayuda* majority loses sight of the fact that Congress created IRCA's judicial review provisions against a well-established background of case law holding that 8 U.S.C. § 1105a does not preclude broad-based regulatory challenges. *See supra* at 15-18. When adopting a new law incorporating sections of a prior law, Congress can be presumed to have knowledge of the interpretation given to the incorporated law, *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782, n.15 (1985),[23] and to adopt that interpretation when it incorporates the prior law with-

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[23] *See also Lorillard v. Pons*, 434 U.S. 575, 580-581, (1978); *Bob Jones University v. United States*, 461 U.S. 574, 601-602 (1983); *Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Curran*, 456 U.S. 353, 381-382 (1982).

out change. *Id. See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951); *National Lead Co. v. United States*, 252 U.S. 140, 147 (1920). That Congress implemented judicial review of legalization denials through the preexisting statutory structure of 8 U.S.C. § 1105a—without further restriction of or change to that section—establishes that Congress did not seek to alter legislatively the case law on § 1105a with respect to IRCA.[24]

III. THERE WAS NO LEGISLATIVE INTENT TO PRECLUDE FEDERAL QUESTION JURISDICTION OF CHALLENGES BROUGHT BY QUALIFIED DESIGNATED ENTITIES

As in its analysis of the judicial review sections of IRCA, the *Ayuda* majority undermines the presumption of judicial reviewability by finding in IRCA's legislative history an "implied preclusion of suits by QDEs or other organizations." 880 F.2d at 1340. Yet such a preclusion is not even "fairly discernible in the statutory scheme." *Block v. Community Nutrition Institute*, 467 U.S. at 351. It is nonexistent.

The *Ayuda* majority asserts that the interests of QDEs are "clearly so similar to those of the aliens that no statutory interest is left unprotected" by precluding judicial review of challenges raised by QDEs. 880 F.2d at 1340. Yet the goal of offering capable, informed assistance to

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[24] Paradoxically, the *Ayuda* majority rejected petitioners' reliance on *International Union, UAW v. Brock*, 477 U.S. 274 (1986), in which this Court held that the judicial review provisions of the Trade Act of 1974 regarding trade readjustment allowance benefits did not bar a union's federal district court challenge to a Trade Act regulation relating to these benefits. The *Ayuda* court stated that "[t]he Trade Act was passed against a background of a line of cases in the Supreme Court and lower federal courts holding that there is a federal jurisdiction to review state unemployment insurance claims that raise questions of federal law," 880 F.2d at 1338, but refused to recognize that a similar contemporary legal context existed when Congress passed IRCA.

legalization applicants is quite distinct from that of successfully obtaining legal status. QDEs are discrete legal entities from the aliens they represent and therefore suffer significantly different types of harm as the result of an unlawful regulation.[25]

Having created the special role of QDEs,[26] it is hardly conceivable that Congress would have prevented them from seeking judicially-mandated relief to protect that role. In the absence of evidence that Congress intended to restrict judicial review of challenges raised by QDEs and other organizations, under the teachings of this Court in *Abbott Laboratories, Inc. v. Gardner*, *supra*, and *Traynor v. Turnage*, *supra*, review is to be presumed.

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[25] The district court found that the QDE Plaintiffs in this case suffered both a palpable impairment to their ability to perform core statutory functions and a direct financial injury resulting from the INS's promulgation of its unlawful "known to the Government" regulation and guidelines, and that those harms were significantly different from the harms suffered by the individual alien plaintiffs. *Ayuda v. Meese*, 687 F. Supp. at 655-657. In a like manner, the district court found this case to be "a classic case for organizational standing." *Id.* at 657-60. *See also* Chief Judge Wald's dissent, 880 F.2d at 1364-65.

[26] Congress recognized that potential applicants for legalization were members of a "fearful and clearly exploitable" "subclass" within American society, S. Rep. No. 132, 99th Cong., 1st Sess. 16 (1985), naturally wary of governmental authority. H. Rep. No. 682, 99th Cong., 2d Sess. 49 (1986). In order to garner a high participation rate in an atmosphere of trust and understanding, *id.* at 73, Congress established QDEs to reach out to the illegal alien community, to encourage and assist them in applying for legalization. 8 U.S.C. § 1255a(c)(2). *See* S. Rep. No. 132 at 47. QDEs are required, by statute, to act as intermediaries between the INS and the alien community, to counsel applicants, disseminate information about the program and to screen and process applications. *See* 8 U.S.C. § 1255a(c)(1)-(4). Clearly an essential component of the statutory function of the QDEs was a solid understanding of the parameters of the legalization eligibility requirements and an ability to explain and apply these requirements.

IV. THE INS'S ACTION ON SECTION 265 CLAIMS CONSISTED OF A REGULATION AND POLICY STATEMENTS AND WAS THEREFORE FINAL ACTION RIPE FOR JUDICIAL REVIEW, ESPECIALLY IN LIGHT OF THE IMPENDING APPLICATION DEADLINE

The *Ayuda* majority also holds that the district court lacked jurisdiction because the INS policy on § 265 cases was not "final" within the meaning of the APA, 5 U.S.C. § 704, and therefore was not "ripe" for review under *Abbott Laboratories v. Gardner*, 387 U.S. at 149.[27] *Ayuda v. Thornburgh*, 880 F.2d at 1341. The majority's position on ripeness is based upon glaring misconceptions about the facts and the procedural history of the case and a distorted application of the case law on finality.

The inquiry on ripeness in this case must begin with the regulation itself. The "known to the Government" regulation codified at 8 C.F.R. § 245a.1(d) was found by the district court to be "contrary to law" on March 30, 1988. 8 C.F.R. § 245a.1(d) provided that "[a]s *used in this chapter*," the term "government" in the clause "alien's unlawful status was known to the government" "means the Immigration and Naturalization Service."[28] The regulation further states that "[a]n alien's unlawful status was 'known to the government' *only if*" that alien met one of three (and later four) enumerated standards, each requiring the

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[27] *Abbott Laboratories v. Gardner* established a two-part test for ripeness. A lower court must consider "both the fitness of the issue for judicial decision and the hardship to the parties of withholding court consideration." 387 U.S. at 149. *See also, Ciba-Geigy Corp. v. U.S.E.P.A.*, 801 F.2d 430, 435 (D.C. Cir. 1986): "The inquiry as to fitness for review encompasses several factors, including whether the issue presented is a purely legal one, whether consideration of that issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final."

[28] The regulation was published in final form on May 1, 1987 [52 Fed. Reg. 16205, 16208 (1987)] and was later amended slightly on November 17, 1989 [52 Fed. Reg. 43845 (1987)].

presence of a document in the files of the INS. 8 C.F.R. § 245a.1(d) (emphasis added).

Under 8 C.F.R. § 245a.2(b) *only* those aliens who fell within one of these enumerated "categories" could "file for adjustment to temporary residence status." *All others were prohibited.* There was no discretion on the part of the INS, under the terms of the regulation, to accept applications from aliens who did not meet the criteria.

This necessarily precluded those who had § 265 claims from applying, much less having their applications granted by the INS. The *Ayuda* majority therefore is simply wrong when it states that "[t]he INS had never taken a position on the particular question posed by section 265 claimants . . ." or that a ruling on the "known" component of the "known to the Government" standard was "anticipatory . . . without a clear indication of the government's own interpretation." 880 F.2d at 1345. By its terms, 8 C.F.R. § 245a.2 precluded § 265 claimants from filing.[29]

The *Ayuda* majority asserts, however, that the district court, having declared the INS's regulation invalid, should have given the INS the opportunity to consider administratively whether the § 265 situation was encompassed in its redefinition of the statutory term. Even granting this,

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[29] The *Ayuda* majority also erroneously states that "[t]he issue apparently was not raised before the agency during the rulemaking process . . . ." 880 F.2d at 1345. During the comment period for the proposed regulations, an immigration attorney from Texas, Eugene J. Flynn, submitted comments on the "known to the Government" regulations. These comments specifically raised the issue of the absence of a document from government files. Mr. Flynn commented " 'Known to the Government' can simply mean that there is actually something *missing* from the file that conclusively shows that an alien, on whatever date, was in violation of his status." (Emphasis added.) While the INS, in its Preamble to the final regulation, did not specifically address this issue, it did say that it had given "review and careful consideration [to] all comments" on the "known to the Government" proposal. 52 Fed. Reg. at 16206 (1987).

the district court did give the INS such an opportunity. Following the entry of the district court's March 30, 1988 order, the INS filed with the court a copy of an official INS "Telegraphic Message" sent on April 15, 1988, to all Immigration Offices. This Message states, *inter alia*:

> The instruction on the "known to the government" court standard is clarified as follows: *documentation* must have existed in one or more federal agencies so that when such *documentation* is taken as a whole it would warrant the finding that the nonimmigrant alien's status in the United States was unlawful. Such *documentation* must be in the files of the government prior to January 1, 1982 . . . (emphasis added).

The INS, on April 13, 1988, also sent letters to all QDEs with similar statements concerning "documentation." These letters concluded with the statement that "the violation must be able to be induced from evidence *submitted to* Federal agencies only, and prior to January 1, 1982." (Emphasis added.)

The requirement of *documentation submitted to* a federal agency, necessarily precludes an alien from asserting a § 265 claim under the "known to the Government" provision. It is the *absence* of documentation (that is, the knowing *failure* to file quarterly or annual reports prior to 1982) which puts a government agency on notice of unlawful status and thereby renders non-registrants eligible for legalization.

The *Ayuda* majority further neglects completely the fact that the statutory deadline, in practical effect, rendered the INS's action ripe for review. Congress allowed only a twelve-month period for aliens to apply, and that period lapsed on May 4, 1988. 8 U.S.C. §1255a(a)(1)(A). Even the *Ayuda* majority concedes that for almost eleven of those twelve months (that is, until the district court ruling on March 30, 1988), an INS regulation was in place which

"appears to have precluded section 265 claims." 880 F.2d at 1342. Following the district court ruling, the record shows that every INS official before whom the § 265 issue was presented recommended denial of legalization benefits, consistent with the INS's original regulation defining "known to the Government." Given the impending application deadline, awaiting a more formal expression of the INS's position on this issue might well have caused the issue to become moot for those aliens who, unsure of their eligibility, had not filed applications prior to May 4, 1988.[30] For QDEs and community organizations, too, the deadline meant that the § 265 issue had to be resolved while these organizations could still advise aliens whether to proceed with their legalization applications. As this Court has instructed, the finality requirements are to be applied in a "flexible" and "pragmatic" way. *See Abbott Laboratories v. Gardner*, 387 U.S. at 149-150. Realistically, the INS's position on the § 265 theory of eligibility for legalization was as final as it was going to become under the circumstances.[31]

Clearly, there was no governmental or judicial interest in delaying judicial review. Even the INS should have supported such review, as a speedy resolution would promote

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[30] Whether the district court would have had the power either to extend the statutory deadline or to view the subsequently filed applications as constructively filed remains an open issue. *See In Re Thornburgh, supra.* However, the practical effect of a fixed-date statutory deadline was sufficient to warrant the district court's action.

[31] Furthermore, the question whether the district court's definition of the term "known to the Government" encompassed § 265 violations was a purely legal one, the consideration of which would not have benefited from a more concrete factual setting. *Id. See Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581-582 (1985). *See also Ciba-Geigy Corporation v. U.S. E.P.A.*, 801 F.2d 430, 435 (D.C. Cir. 1986). Indeed, the question merely required a clarification of the scope of the district court's prior orders. The resolution of the question would certainly not have varied based upon the factual situation of a particular applicant.

efficient and uniform adjudication of legalization applications. "[I]n the absence of any 'significant agency or judicial interests militating in favor of delay, we cannot imagine how the hardship factor could ever tip the balance against judicial review.' " *Hotel and Restaurant Employees Union v. Smith*, 563 F. Supp. 157, 162 (D.D.C. 1983), *summary judgment granted for defendant*, 594 F.Supp. 502 (D.D.C. 1984), *aff'd by an equally divided court*, 846 F.2d 1499, 1508 (D.C. Cir. 1988) (*en banc*) (opinion of Judge Mikva), *quoting Payne Enterprises v. U.S.*, 837 F.2d 486, 493 n.10 (D.C. Cir. 1988). Even if the INS or the court could have enunciated a reason for postponing review, the hardship to the parties was of such an immediate and practical impact that it would have outweighed any institutional interest in delaying review. *See Eagle-Picher Industries v. U.S. E.P.A.*, 759 F.2d 905, 915 (1985).[32]

Contrary to the assertion of the *Ayuda* majority, the record in this case, and the Complaint itself, demonstrate incontrovertibly that the organizational plaintiffs alleged hardship in their counseling role. *See, e.g.*, Complaint, ¶¶ 10, 13, 17, 22-21.[33] Many QDEs and other organizations

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[32] The hardship to the aliens was found by the district court to be real, immediate, and irreparable. As that court found in its original March 30, 1988 order:

> The testimony shows that the individual plaintiffs are generally people without extensive financial resources. They will have a hard time paying the application fee. It would be foolhardy for many of them to pay the filing fee while faced with INS' "known to the Government" regulation—which makes it quite clear that they will place their money at great risk. Hence, if the status quo continues, most of them will not apply for legalization. If an otherwise eligible alien does not submit an application prior to May 4, 1988, he or she may well be forever barred from applying for legalization. . . .

Ayuda v. Meese, 687 F.Supp. at 665-66.

[33] *See also* Proposed Intervenors' Complaint ¶¶ 8, 12-23, and 29.

were expending enormous amounts of time and resources to find possible avenues of relief for § 265 violators. In deciding whether to advise § 265 claimants to go forward with their applications, these organizations faced a perplexing dilemma: Should they counsel such aliens not to file applications, given the significant application fee and the INS policy of recommending denial in these cases, or should they advise aliens to go forward out a belief that the aliens might forfeit their rights altogether by failing to file an apparently futile application prior to May 5, 1989?

Especially in the waning days of the legalization program, when plaintiff organizations' first instinct would be to encourage as many aliens as possible to attempt to obtain legalization benefits prior to the expiration of the deadline, the confusion over the § 265 theory of eligibility presented a very real and compelling hardship which militated in favor of judicial review.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, a writ of *certiorari* should issue to review the decision of the Court of Appeals in this case.

Respectfully submitted,

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